

Office of the Governor

August 9, 2006

Dirk Kempthorne
Secretary of the Interior
United States Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

via certified mail

H. Dale Hall
Director
United States Fish and Wildlife Service
1849 C Street, NW
Washington, D.C. 20240

via certified mail

Mitch King
Region 6 Director
United States Fish and Wildlife Service
134 Union Boulevard
Lakewood, CO 80228-1807

via certified mail

RE: 60 Day Notice of Intent to Sue for Violations of the Endangered
Species Act — Gray Wolf (*canis lupus*)

Dear Secretary Kempthorne, Director Hall, and Region 6 Director King:

We were disappointed to learn that you have denied the State's petition to delist the gray wolf. Disappointed, but not surprised.

While the petition to delist was under consideration, public statements from the Service clearly showed that you intended to reject WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan for the same reasons stated in the January 2004 letter from the Service. The written explanation of your decision on the petition to delist not only confirms that you prejudged the issue of whether WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are "adequate regulatory mechanisms" for purposes of the Endangered Species Act ("ESA"), but also shows that you again ignored the

peer review findings on the Wyoming Plan and instead relied upon unpublished, non-peer reviewed and unreliable scientific data to support your decision.

The denial of the petition to delist marks yet another unfortunate chapter in the history of wolf delisting in Wyoming. At best, you have been incompetent in your handling of the wolf delisting matter and your incompetence has resulted in violations of the ESA, the ESA implementing regulations, and the Administrative Procedure Act ("APA"). At worst, you have intentionally violated federal law in an attempt to promote a federal political agenda unrelated to the legal requirements of the ESA. Without question, you have been much less than forthright in your dealings with State of Wyoming ("State") officials with respect to your assessment of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan. Your steadfast refusal to evaluate WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan based solely upon the best scientific and commercial data available leaves the State with no alternative but to file suit to compel you to comply with the legal requirements of the ESA, the ESA implementing regulations, and the APA.

Background

In November 1994, the Service issued a final rule pursuant to the ESA which authorized the introduction of an experimental, non-essential gray wolf population into Yellowstone National Park. The Service agreed that wolves would be delisted once there were a minimum of 30 breeding pairs and over 300 wolves well distributed among Idaho, Montana, and Wyoming for three successive years.

December, 2002, marked the third consecutive year that the gray wolf population in the northern Rocky Mountain region surpassed the minimum recovery goals. The minimum recovery goals again were surpassed in 2003, 2004, and 2005. Despite having exceeded the minimum recovery goals for six consecutive years, the gray wolf population in the northern Rocky Mountain region still remains listed. As of December 2005, the Service estimated that 1,020 reintroduced wolves reside in the northern Rocky Mountain region, including an estimated 134 wolves in at least 13 packs in Wyoming and 118 wolves in 13 packs in Yellowstone. These counts are likely low because the Service only counts wolves included in a pack with a radio-collared animal. Many dispersing wolves, or packs, have not been radio-collared and are therefore not counted.

In 2002, the Wyoming Department of Game and Fish ("Department") began drafting a wolf management plan to govern the management of wolves in Wyoming after delisting. In late January 2003, Wyoming Governor Dave Freudenthal asked then-Secretary of the Interior Gale Norton to tell State officials exactly what changes needed to be made to the Wyoming statutes and the Wyoming Plan for both to satisfy the adequate regulatory mechanism requirement

for delisting. United States Senator Craig Thomas, United States Senator Mike Enzi, and United States Representative Barbara Cubin (collectively "the Wyoming Congressional Delegation") made a similar request to Secretary Norton.

Steve Williams, who was the Director of the Service at the time, responded to the Wyoming Congressional Delegation, explaining that the Service had determined that: (1) "the current draft legislative provisions [HB229] regarding management authorities and maintenance of 15 wolf packs in Wyoming (8 inside National Parks and 7 outside) should satisfy this requirement[;]" and (2) "the State's current draft legislative provisions [HB229] requiring monitoring and reporting should satisfy this requirement."

Craig Manson, the then-Assistant Secretary of the Interior for Fish and Wildlife and Parks, responded to Governor Freudenthal. Mr. Manson repeated verbatim comments that Director Williams made to the Wyoming Congressional Delegation regarding the management authority and monitoring provisions in HB229.

In reliance on these representations, the Wyoming Legislature enacted HB229 to govern the management of gray wolves in Wyoming upon delisting. HB229 is codified as WYO. STAT. ANN. § 23-1-304. Section 23-1-304 provides that, upon delisting, the Department shall manage at least 15 wolf packs in Wyoming as a whole and at least seven wolf packs living outside of Yellowstone and Grand Teton National Parks (collectively referred to as "the Parks"). WYO. STAT. ANN. § 23-1-304(b)(i). Gray wolves shall be classified as "trophy game animals" in the Parks and those federally designated wilderness areas contiguous to the Parks, and classified as "predatory animals" in all other areas of Wyoming. WYO. STAT. ANN. § 23-1-304(b)(ii). If there are less than seven wolf packs located in Wyoming and primarily outside of the Parks, the Commission shall adopt rules and regulations to classify the gray wolf as a "trophy game animal" within that area of Wyoming the Commission determines is necessary to reasonably ensure that seven wolf packs are located in Wyoming and primarily outside of the Parks. WYO. STAT. ANN. § 23-1-304(b)(i)(A). The Wyoming Legislature defined the term "pack" as five or more gray wolves traveling together. WYO. STAT. ANN. § 23-1-304(c).

In mid-April 2003, Ed Bangs e-mailed John Blankenship, the then-Deputy Region 6 Director of the Service, and other Service officials and informed them that in an interview with High County News Radio, Bangs had stated that "human caused mortality" was the only issue preventing delisting. Bangs further stated that "predator status would mean no wolves in those areas and was a public relations problem, but biologically it was fine if Wyoming managed for a wolf population in the GYA [Greater Yellowstone Area]."

In July 2003, the Wyoming Game and Fish Commission approved the final Wyoming Plan. In the final Wyoming Plan, the Department committed to maintaining a minimum of 15 packs within Wyoming and to maintaining seven of the 15 packs outside of the Parks. The Department also committed to applying the definition of "pack" in WYO. STAT. ANN. § 23-1-304(c). The final Wyoming Plan adopted a strategy for managing fluctuating wolf populations. If the number of wolf packs falls to seven or less outside of the Parks, the Commission will immediately promulgate a rule to classify the gray wolf as a "trophy game animal" in a geographic area known as the Northwest Wyoming Wolf Data Analysis Unit ("Wolf DAU"). Wolves living in Wyoming outside of the Wolf DAU will be classified as "predatory animals." The Wolf DAU initially will encompass an area of 9,780 square miles (6,259,200 acres). The Wolf DAU will include the National Parks, the wilderness areas contiguous to the National Parks (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, Winegar Hole, and Gros Ventre), and 2,642 square miles of land in Wyoming surrounding the National Parks and the contiguous wilderness areas.

Under the Wyoming Plan, wolves will be absolutely protected from take in the Parks, which encompass an area of 3,945 square miles (2,254,800 acres) of Wyoming. Wolves will be classified full-time as "trophy game animals" in the wilderness areas contiguous to the Parks (Absaroka-Beartooth, North Absaroka, Washakie, Teton, Jedediah Smith, and Gros Ventre). These wilderness areas where wolf take would be actively managed to maintain viable population and pack numbers encompasses a total area of 3,193 square miles (2,043,520 acres). Thus, wolves will be absolutely protected or subject to limited take, pursuant to hunting seasons, licensed take, and hunting areas, in an area encompassing 7,138 square miles (4,298,320 acres).

In September 2003, Mr. Bangs submitted the Wyoming Plan for independent scientific review by "12 of the top recognized wolf researchers, wolf management and livestock depredation experts in North America." Eleven (11) of the 12 peer review experts submitted their scientific reviews of the three state management plans.¹ Ten of the eleven peer reviewers found that the Wyoming Plan, in combination with the Idaho and Montana Plans, would lead to a sustainable population of gray wolves in the northern Rocky Mountain region. The peer review experts made the following findings:

¹ Dr. Paul Paquet, a Canadian wolf/carnivore predatory prey expert, was the twelfth peer review expert selected. For unknown reasons, Dr. Paquet did not submit a peer review critique on the three state management plans.

Dr. Warren Ballard - Professor, Texas Tech University: Dr. Ballard concluded that "the plans will meet the objectives of maintaining at least 30 packs equally distributed in each state" and that "each of the state's wolf management plans are adequate to maintain a viable population of wolves in the [Western DPS]."

Rod Boertje - Biologist, Alaska Department of Fish and Game: Mr. Boertje concluded that "Wyoming's plan for 15 packs, 7 outside the parks, [is] adequate to achieve the [Service's] plan for 10 breeding pairs" of wolves in Wyoming. He further stated that "I view the state plans adequate to collectively maintain at least 30 breeding pairs of wolves into the foreseeable future."

Dr. Todd Fuller - Professor, University of Massachusetts: Dr. Fuller concluded that the Wyoming Plan will fulfill Wyoming's portion of the population goals needed to concur with delisting criteria. He also determined that "[t]he state plans will collectively maintain, at a minimum, the wolf population at or above 30 breeding pairs that are equitably distributed among Montana, Idaho, and Wyoming into the foreseeable future."

James Hammill - President, Iron Range Consulting & Services: Although Mr. Hammill stated that "Wyoming's plan exposes wolves in Wyoming to risk of catastrophic loss outside of National Parks and Parkway," he offered no specific opinion as to whether the Wyoming Plan will achieve its objectives. Despite his concerns about the Wyoming Plan, Mr. Hammill opined that "these plans provide enough protection and management foresight to provide a wolf population at or above 30 breeding pairs into the foreseeable future."

Dr. Kyran Kunkel - Professor, Montana State University: Dr. Kunkel determined that the Wyoming Plan may not achieve its stated objectives. In his opinion, if Wyoming changes its plan: (1) to make wolves trophy game animals in areas encompassing existing packs; (2) to add a mechanism to respond to a decline in packs in Yellowstone to below eight packs; and (3) to allow for trophy game classification to be extended beyond DAU if necessary, then "the Wyoming

[P]lan should meet its and federal objective for wolf recovery.” Dr. Kunkel further states that the three plans collectively are adequate to ensure wolf recovery into the foreseeable future if Wyoming makes his suggested changes to its plan.

Mark McNay - Biologist, Alaska Department of Fish and Game: Mr. McNay concluded that the Wyoming Plan should “adequately insure a minimum statewide population of at least 10 breeding pairs within the foreseeable future. He also determined that “the Wolf Conservation and Management Plans of Idaho, Montana, and Wyoming in combination are adequate to insure equitable distribution of 30 or more breeding pairs in Idaho, Montana, and Wyoming for the foreseeable future.”

Dr. L. David Mech - Senior Research Scientist, U.S. Department of the Interior Geological Survey: Dr. Mech concluded that the Wyoming Plan will achieve its objectives and that “[the three state management plans collectively] should insure maintaining this wolf population at 30 or more breeding pairs for the foreseeable future.” He also determined that the classification of wolves as “predators” in some parts of Wyoming will not prevent Wyoming from maintaining a minimum of 15 wolf packs due to “fail-safe mechanism” of changing status of the wolf if the number of packs drops to seven packs.

Bill Paul - Wolf Control/Depredation Expert, U.S. Department of Agriculture: Mr. Paul determined that the Wyoming Plan will achieve its stated objectives and that “the plans for the three states will collectively maintain a recovered wolf population at or above 30 breeding pairs of wolves.”

Dr. Rolf O. Peterson - Professor, Michigan Tech University: Dr. Peterson concluded that the Wyoming Plan will maintain minimum numerical targets specified by the Service and that “collectively, these plans should maintain the wolf population at or above the recovery levels specified by the Service, although I have concerns regarding the Idaho plan that undermine that judgment.”

Dr. Daniel Pletscher - Professor, University of Montana: Dr. Pletscher concluded that the Wyoming Plan “probably will work,” but he expressed concerns that managing for seven wolf packs outside of the Parks is more difficult than managing for at least seven wolf packs outside of the Parks and that predator status allows little management flexibility. With respect to his concerns about the predator status, Dr. Pletscher stated that “[t]his *probably* won’t make a difference in maintaining the desired number of wolf packs in Wyoming[.]” He then opined that “[d]espite my suggestions regarding how the Wyoming Plan could be improved, I believe that implementation of these plans would maintain at least 30 breeding pairs of wolves distributed among Idaho, Montana, and Wyoming.”

Adrian Wydeven - Lead Wolf Biologist, Wisconsin Department of Natural Resources: Mr. Wydeven concluded that “[t]here is reasonable assurance that 10 or more wolves [*sic*] would be maintained in Wyoming, but this is more due to the presence of Yellowstone National Park, and sound management plans by the 2 adjacent states.” Despite his belief that the Wyoming Plan is “very rigid, narrow in scope, and lacks flexibility,” he did not say that any of the weaknesses were fatal to the Wyoming Plan achieving its objectives. Mr. Wydeven concluded that “[t]he 3 state wolf management plans seem to be adequate for maintaining 30 breeding packs in the Northern Rocky Mountains region.”

On January 13, 2004, Mr. Williams notified the Department that the Service had rejected the Wyoming Plan and that, as a result, “delisting cannot be proposed at this time[.]” He explained that “the Service intends to proceed with the proposed delisting process for the gray wolf in the [Western DPS]” if the State changed the ‘predatory’ animal status for wolves, changed state law to commit to managing for at least 15 wolf packs in Wyoming, and changed the statutory definition of “pack.”

On January 15, 2004, Paul Hoffman, then the Deputy Assistant Secretary of the Department of Interior for Fish, Wildlife and Parks, testified before the Joint Travel, Recreation, Wildlife, and Cultural Resources Interim Committee of the Wyoming Legislature. Mr. Hoffman testified that “from a strictly science perspective . . . the [wolf] plans were deemed adequate. It’s the legal considerations that prompt us to say no at this time.”

Mr. Hoffman also testified that the Service did not care how many wolves were killed outside of the Greater Yellowstone recovery area as long as there was a "regulated harvest scheme." Mr. Hoffman stated, "We are not interested in dictating what the harvest mechanism is. We're not interested in dictating to Wyoming what the seasons are, what the hunt areas are, **what the quotas are**, what the price tags are . . . None of that matters to us." (emphasis added)

In April 2004, the State filed suit alleging that the rejection of the Wyoming Plan was a final agency action subject to judicial review. The State alleged the decision was based on political considerations, fear of lawsuits by environmental groups, and in violation of the "best science" mandate of the ESA. In 2005, the United States District Court for the District of Wyoming found no final agency action and dismissed the lawsuit. This decision was affirmed by the Tenth Circuit Court of Appeals on April 3, 2006. The courts refused to review the rejection of the Wyoming Plan finding the rejection was not "final agency action." Because of this ruling, no court has yet to address the merits of the State's arguments that the Wyoming Plan was illegally rejected under the ESA.

In July 2005, the State filed a petition asking the Secretary of the Interior to establish a northern Rocky Mountain distinct population segment ("NRM DPS") for the gray wolf and to delist the NRM DPS. In mid-October 2005, the Service announced that the State's petition to delist presented substantial evidence showing that the delisting of the northern Rocky Mountain gray wolf population may be warranted. The Service published notice of the positive 90-day finding in the Federal Register on October 26, 2005.

On December 15, 2005, Mr. Hoffman once again testified before the Wyoming Legislature's Joint Travel, Recreation, Wildlife, and Cultural Resources Interim Committee. At several points in his testimony, Mr. Hoffman made it clear that the Service's objection to the "predator" classification and demand for a licensing scheme was purely political. The following testimony is illustrative:

"[W]e would like Wyoming to move to a licensed hunt. We are not asking Wyoming to set any particular seasons, to set the fee any particular way, to establish hunt areas around any particular boundaries, or to establish certain daily bag limits, if you will. We believe that that's the prerogative of the state to set the seasons, the bag limits, the hunt areas, and the prices for the licenses."

* * *

"You can assign whatever season, limit, license fee, hunt area you want [.]"

Mr. Hoffman also testified that defining "pack" as at least five wolves traveling together was "biologically sustainable."

In February 2006, the Service published an "advanced notice of proposed rulemaking" in the Federal Register. The advanced notice pre-determined the decision on the State's petition to delist, as the Service stated several times that it intended to conduct rulemaking to establish a DPS of the gray wolf in the northern Rocky Mountain region and to delist the DPS if the State changed its wolf management statute and the Wyoming Plan as demanded in the January 13, 2004, letter from Mr. Williams.

In late July 2006, the Service announced that it had denied the State's petition to delist because WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms for purposes of the ESA. The Service explained that it "cannot propose to delist the wolf until [the State of Wyoming] amends its law and approves a wolf management plan that regulates and limits human take of wolves, commits to maintaining at least 10 breeding pairs and 100 wolves in mid-winter, and defines wolf pack for management purposes using consistent and acceptable scientific standards."

On August 1, 2006, the Service published its decision on the State's petition to delist in the Federal Register. In explaining why WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms, the Service cites "(Ausband 2006)" as the only biological or scientific evidence in support of its decision. The "(Ausband 2006)" citation refers to eight pages of information about the relationship between breeding pairs and pack size that the Service received from an individual named Dave Ausband during a presentation at a meeting of the Interagency Wolf Working Group in Missoula, Montana, on June 27, 2006. The eight pages of information provided by Mr. Ausband consist of six pages of graphs and two pages of linear and logistical regression equations. As of the date of the Service's denial of the petition to delist, Mr. Ausband had not produced a written report of his findings and, as a result, his findings have not been published or peer reviewed. Mr. Ausband also apparently has not provided the Service with the data that supports his findings. Notwithstanding the fact that Mr. Ausband's findings are unpublished, not peer reviewed and therefore unreliable, his findings in no way refute the evidence the State presented in the petition to delist with respect to the relationship between the statutory definition of "pack" and the likelihood that a pack has a breeding pair.

Notice of Intent to Sue

In accordance with the 60-day notice requirement in 16 U.S.C. § 1540(g)(2) of the ESA, you are hereby notified that the State of Wyoming intends to file a

civil action against the United States Department of the Interior, the United States Fish and Wildlife Service, and each of you to enjoin continuing violations of the ESA, the ESA implementing regulations, and the APA, and to compel you to comply with these laws. The State's claims arise from the Service's denial of the State's petition to establish a northern Rocky Mountain distinct population segment ("NRM DPS") for the gray wolf and to delist the NRM DPS. *See* 71 Fed. Reg. 43,410 – 43,432 (Aug. 1, 2006). In denying the petition to delist, the Service (acting on behalf of the Secretary of the Interior) violated 5 U.S.C. § 706(1) and (2), 16 U.S.C. §§ 1533 and 1539, and 50 C.F.R. §§ 17.84(i)(9), 424.11, 424.13, and 424.14. The State intends to bring suit pursuant to 16 U.S.C. § 1540(g)(1)(A) and (C) of the ESA and 5 U.S.C. § 701 through 706 of the APA.

Violations of the ESA, ESA Implementing Regulations, and the APA

The Service's denial of the State's petition was arbitrary, capricious, an abuse of discretion, in excess of constitutional and statutory right, contrary to the evidence before the Service, and not supported by substantial evidence. In rejecting the State's petition to delist, the Service violated the ESA, the ESA implementing regulations, and/or the APA in at least seven ways.

First, in evaluating WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan, the Service relied upon factors Congress did not intend for the Service to consider. The ESA dictates that delisting decisions be based "solely" upon the best scientific and commercial data available. Congress added the term "solely" to 16 U.S.C. § 1533(b) in 1982 "to remove from the process of listing or delisting of species any factors not related to the biological status of the species." In finding that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms, the Service improperly relied upon political considerations, concerns about possible future litigation by conservation groups, and concerns regarding the legal implementation of the Wyoming Plan. These factors do not relate to the biological status of the gray wolf.

Second, the Service acted outside of its decision-making authority under the ESA when it relied upon concerns regarding the legal implementation of the Wyoming Plan. The ESA does not vest the Service (or the Secretary) with authority to interpret WYO. STAT. ANN. § 23-1-304 or the Wyoming Plan from a legal perspective or to pass judgment on whether the Wyoming Plan legally may be implemented. Legal questions such as these must be answered by the State. In May 2003, the Wyoming Attorney General determined that, as a matter of law, the Wyoming Plan is consistent with WYO. STAT. ANN. § 23-1-304. The Service had no authority to disregard the May 2003 opinion from the Wyoming Attorney General in its evaluation of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan.

Third, in evaluating the petition to delist, the Service did not comply with the non-discretionary "best science" mandate in the ESA. Interior has adopted a policy that requires the Service to solicit independent peer reviews to ensure that the best scientific data available is being used when making decisions under the ESA. In 2003, the Service selected a panel of 11 preeminent wolf management experts to peer review the Wyoming Plan. Ten of the 11 peer review experts concluded that the Wyoming Plan is an adequate regulatory mechanism for purposes of the ESA. The findings of these peer review experts are the "best scientific and commercial data available" regarding the adequacy of the Wyoming Plan. In evaluating the petition to delist, the Service rejected the findings of the peer review experts for four reasons that have no basis in fact and/or law and instead improperly relied on Mr. Ausband's unpublished and non-peer reviewed findings to support its decision. The stated reasons for finding that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms thus either have no biological basis or are based upon something other than the best scientific data available. The Service's actions with respect to the peer review also violate the pronouncements in the 1994 interagency peer review policy statement, and the Office of Management and Budget "Final Information Quality Bulletin for Peer Review."

Fourth, in denying the petition to delist, the Service improperly relied upon speculation about future management actions by the State of Wyoming. In an attempt to explain the alleged deficiencies of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan, the Service described several possible scenarios which could result in less than ten breeding pairs of wolves in Wyoming. For each scenario, the Service described what "could" happen in the future, speculated as to what actions the Department "likely" would take under such circumstances, and drew negative inferences which the Service then relied upon to discredit biological soundness of WYO. STAT. ANN. 23-1-304 and the Wyoming Plan. The ESA precludes the Service from relying on speculative future management actions by a state in making listing or delisting decisions.

Fifth, in evaluating the petition to delist, the Service changed positions without explanation with respect to numerous material aspects of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan. For example, the Service asked the peer review experts to determine whether the wolf management plans from Idaho, Montana, and Wyoming collectively would conserve a recovered wolf population for the foreseeable future. In addressing the petition to delist, the Service discarded the evaluation standard it had asked the peer review experts to use. The Service also applied a different standard in evaluating WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan than it used in evaluating the Idaho and Montana wolf management statutes and plans. As a second example, the Service used the original "equal distribution" recovery goals in evaluating the Wyoming Plan

instead of the “well distributed” or “equitable distribution” goals the Service adopted in 2002. As another example, during the formulation of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan, officials at the highest levels of Interior and the Service (Craig Manson, Paul Hoffman, Steve Williams, Ralph Morgenweck, John Blankenship, and Ed Bangs) explicitly approved the management scheme set forth in the statute and the Wyoming Plan, including the dual classification for wolves, the management objectives for the number of packs in Wyoming, and the statutory definition of “pack.” In denying the petition to delist, the Service cited the dual classification, the management objectives, and the definition of “pack” as the reasons why WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms. At no time during the development of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan did any official from the Service or Interior tell any official from the State that the “predatory animal” classification for wolves, the management objectives, or the statutory definition of “pack” were biologically unsound and therefore unacceptable under the ESA. For each of the foregoing examples, the Service has not explained why it changed positions in its findings on the petition to delist.

Sixth, the denial of the petition to delist violates the Tenth Amendment to the United States Constitution. The changes the Service have demanded with respect to WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are simply a command for the Wyoming Legislature and the Wyoming Game and Fish Commission to implement a politically motivated interpretation of the “adequate regulatory mechanisms” requirement in the ESA. The reasons for demanding the changes to Wyoming law have nothing to do with the requirements of the ESA. The Service has demanded the changes to mollify certain segments of the American public who find the predator classification to be politically unacceptable, regardless of the effect of predator status on the overall recovery of the wolf population. The Service thus is using the “adequate regulatory mechanisms” requirement in the ESA as an excuse to force the Wyoming Legislature to enact wolf management statutes that promote a federal political agenda unrelated to the legal requirements of the ESA.

Finally, the decision to deny the petition to delist is contrary to the evidence and is not supported by substantial evidence. The Service’s explanation of its decision on the petition to delist contains numerous factual inaccuracies and misinterprets WYO. STAT. ANN. § 23-1-304, the Wyoming Plan, and the May 2003 opinion from the Wyoming Attorney General. The Service’s stated reasons for finding that WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan are not adequate regulatory mechanisms either have no scientific support or are based upon a selective use of scientific evidence that is not the best scientific data available. The only science cited by the Service, Mr. Ausband’s unpublished and non-peer reviewed findings, are not the best scientific data available and in no way refute

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the evidence the State presented in the petition to delist with respect to the relationship between the statutory definition of "pack" and the likelihood that a pack has a breeding pair. In many instances, the Service improperly relied upon hypothetical conjecture instead of established facts to support its findings with respect to WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan. The evidence relied on by the Service is not the type of evidence a reasonable mind might accept as adequate to support the decision with respect to the adequacy of WYO. STAT. ANN. § 23-1-304 and the Wyoming Plan and with respect to the denial of the petition to delist.

Conclusion

In accordance with 16 U.S.C. § 1540(g), the State must wait 60 days after the date of this notice to file suit to remedy the above-cited violations of law. In the civil action, the State may seek declaratory and injunctive relief and its costs of litigation, including reasonable attorney and expert witness fees.

The 60-day notice requirement in the ESA is intended to give you an opportunity to correct the above-cited violations and thereby avoid the need for the State to file suit seeking a court order to compel you to comply with the ESA. The State hopes that you will act promptly to correct the violations cited above and to approve the State's petition to delist. However, if you elect not to do so, the State stands ready to pursue litigation to compel you to comply with the legal requirements in the ESA, the ESA implementing regulations, and the APA.

Please contact Wyoming Attorney General Patrick J. Crank at (307) 777-7841 if you wish to discuss this matter further.

Sincerely,



Dave Freudenthal
Governor



Patrick J. Crank
Attorney General

DF:PJC:pjb